Supreme Court No. 786674

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

Appeal from the Court of Appeals, Division II
Of the State of Washington
No. 32946-8

PETITIONER'S REPLY TO AMICUS CURIAE BRIEF OF WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

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I. INTRODUCTION

Comes Now the Petitioner Financial Indemnity Company and makes the following reply to the Amicus Curiae Brief submitted by the Washington State Trial Lawyers Association Foundation, (hereinafter WSTLA), to the Supreme Court in this matter.

II. STATEMENT OF THE CASE

FACTS

Petitioner, Financial Indemnity Company (hereinafter FIC) only reminds the Court in facing insistence that tort law applies to the contractual and equitable subrogation issues here, that the FIC Auto Policy at issue Part III Underinsured Motorist Coverage Coverage C – Underinsured Motorist Bodily Injury(BI) provides:

We will pay damages for bodily injury which an insured person is **legally entitled to recover** form the owner or operator of an underinsured motor vehicle because of:

1 Bodily Injury sustained by an insured person and caused by an accident; and . . .

The owner's or operator's liability for these damages must arise out of ownership, maintenance or use of the underinsured motor vehicle. . . .

To determine the amounts payable to an insured person under this coverage part, we will first credit against the damages the following: . . .

3 Any amounts paid under other Parts of this policy. " (CP 20) (Emphasis added)

Secondly, to the extent WSTLA argues FIC contends a novel concept that public policy holds each accountable for their own negligence and FIC could only escape Personal Injury Protection (hereinafter PIP) payment per declaratory action under the intentional act exclusion of its policy and RCW 48.22.090(1), it and the Court should be reminded of just how close the actions of Sherry came to intentional by the performance of the Johnny Knoxville "Jackass" jump on the moving vehicle style stunt.

Investigating Tacoma Police officer Joseph Novack, arriving on the scene immediately post MVA contacted Sherry who he testified in perpetuation deposition p. 16 was not offering "much of an explanation other than he was laughing with some other people there", and promptly spoke to a witness who "made a statement that Kevin had been watching an episode of a TV program called Jackass, and on there they performed a stunt where someone jumped over an oncoming car. And this subject

stated that's how the accident occurred, that Kevin attempted to jump over the car." So, Sherry's actions here came very close to being determined fully his intentional fault per the arbitrator and potentially subject to a declaratory action for no coverage as an intentional act.

Public policy, Washington law and the facts mandate Sherry be held accountable and cannot recover for his own contributory negligence..

III. ISSUES

A. THE PARTIES AND WSTLA ESTABLISH THE TRIAL COURT HAD JURISDICTION.

Answer: Per authority cited by both parties and WSTLA, the court should find that the trial court had authority to determine declaratory relief and order full Personal Injury Protection (hereinafter PIP) offset from the UIM arbitration award.

B. DOES MISAPPLICATION OF *THIRINGER* TORT LAW ELIMINATE INSURER CONTRACTUAL AND SUBROGATION PIP OFFSET FROM UIM ARBITRATION AWARDS.

Answer: No. Insurer contractual PIP offset/ subrogation rights have long been upheld and found consistent with public policy. PIP is optional coverage and the fault of the insured does not eliminate the insurer's contractual and equitable rights.

Respondent Sherry and WSTLA simply argue that regardless of contributory negligence, the insured must be "made whole" or "fully compensated" under tort law of *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978), before an insurer can offset PIP payments from a UIM Arbitration award. This is not what *Thiringer* stands for.

They submit pure argument and no differing case law from what has already been provided or any precedent for this position. They submit this position with utter and complete disregard for contract and subrogation law while acknowledging the fact that the PIP and even UIM coverages are optional.

They seek to create new law for UIM arbitration offsets for negligent insureds that will carry over into UIM underinsured and third party recoveries as well. They seek to create new law to eliminate long standing subrogation rights of insurers without justification or authority.

IV. AUTHORITY AND ARGUMENT

PIP offset from third party tortfeasor UIM underinsured/ uninsured arbitration awards occurs by contract. PIP is a contractual first party payment of reasonable and related medical expenses or a continuation of employment wages. It involves payments prior to determination of fault. Then the PIP payments are later recovered per contract by payment from the negligent third party tortfeasor or offset from UIM recovery per the third party fault.

"Fault "is defined as:

> "acts or omissions, including misuses of a product that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of casual relation apply both to fault as the basis for liability and to contributory fault.
>
> A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages." RCW 4.22.015.

As defined insured Kevin Sherry and the other third party driver here, were determined to be at fault and their fault is allocated on a percentage basis per RCW 4.22.070 et.seq.

Despite Sherry's fault for his own losses, he and WSTLA misconstrue and use the terms of art they take from *Thiringer v. American Motors, supra* on when an insured is "MADE WHOLE" or is "FULLY COMPENSATED," to try to create new law.

They argue *Thiringer* set forth, and thereafter *Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), Winters v. State Farm Insurance Company*, 144 Wn.2d 869, 31 P.3d 1164 (2001), *Hamm v. State Farm*, 15 Wn.2d 303, 88 P.3d 395 (2003), *Peterson v. Safeco Ins. Co. of Illinois*, 95 Wn. App. 254, 946 P.2d 632 (1999), *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004), and *Keenan v. Industrial Indem.*, 108 Wn.2d 215, 588 P.2d 191 (1978), *overruled on other grounds*, support the requirement that any insured be made whole or be fully compensated for others and his own negligence/ fault before the insurer has any right of offset or recovery from negligence of a third party.

However, *Thiringer* decided priority of settlement proceeds from the 100% at fault third-party tort feasor to an insured for

losses sustained and to the insurer for PIP payments. *Thiringer* is different from the situation at hand because the at fault third-party tort feasor was paying. It was not UIM funds. It is a misapplication of *Thiringer* to say that in the instant case Sherry must be made whole and fully compensated for 100% of his damages, when he was 70% at fault. And, it is a misapplication of *Mahler, Winters, Hamm, Peterson, Woodley* and *Keenan* to make this same argument, because all involved fault free insureds. It is basic Washington law and common sense that Sherry can't recover for his percentage of fault and more than he is legally entitled to. Sherry is fully "compensated" or "made whole" by his recovery for the 30% third-party tort feasor negligence award.

The Court should instead look to *Tolson* v. *Allstate Ins. Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001), which says the insured failed to demonstrate that he was not fully compensated when receiving the full amount of the arbitration award. *Tolson* was found to be fully compensated for the medical specials found attributable to the accident and he had to reimburse PIP payments to the insurer, even funds the tort feasor was not held responsible for. Also, *Tolson* at 499 found PIP offset clauses "valid and

enforceable," as does a laundry list of authority cited therein at page 499 and also cited by the parties and WSTLA in all of the briefs.

The *Tolson* court further found at page 500 any and all PIP payments and overpayments should be reimbursed as that would "not change the fact that *Tolson* would be fully compensated for the medical specials found attributable to the accident, as well as the full amount of general damages."

The same holds true in the present case with Kevin Sherry. He recovered the full amount of the arbitration award for the medical specials and general damages that the arbitrator found attributable to the third-party tort feasor responsible for the accident. And FIC should have full offset of all PIP payments from Kevin Sherry's fully compensating arbitration award.

The Court of Appeals incorrectly decided that PIP payments did not duplicate the UIM award for Kevin Sherry. The decision resulted in paying him twice for the same injury, the same medical and wage loss, and the same specials. The decision is plainly wrong. The arbitrator awarded Kevin Sherry his full compensation for third-party tort feasor liability in the amount of $42,938.38. If this court lets the Court of Appeals decision

stand it would be a mistake. Without any PIP offset, Kevin Sherry benefits because the arbitration award is increased by the $14,600 in PIP payments, to $57,538.38. This would give Kevin Sherry a double recovery for most of the $15,938.38 in special damages the arbitrator awarded for third-party negligence to come up with the $42,938.38 award.

It should be plain and simple to the Court that the amount legally due Mr. Sherry to "make him whole" is the percentage of legal liability or fault of the tort feasor and recovery amount therefore. Even if the tort law of *Thiringer* is to be applied here, Sherry has been made whole and fully compensated by the tort feasor's 30% liability and arbitration award of damages of $42,938.38. Again, the contract of insurance with Financial Indemnity Company says it will only pay Mr. Sherry for "bodily injury for which an insured person **is legally entitled to recover** from the owner or operator of an insured motor vehicle because of: "bodily injured sustained by an insured person and caused by an accident." CP 20 (Emphasis added)

Finally, since *Thiringer* was decided, a large body of law developed as cited by the parties supporting, reinforcing and

holding strong the right of a UIM insurer to offset PIP payments from a UIM arbitration award. [1]

The Court has been provided with no legitimate authority or basis by WSTLA or Sherry to alter the course of contract and subrogation law. Under the contract and equitable principles herein, the Court should not allow the Court of Appeals to alter this case law and mistakenly apply *Thiringer* as it did.

PIP offset clauses are clearly enforceable. Even the case most recently cited by Sherry stands for this and points out the vast body of case law in Washington and other jurisdictions upholding the PIP Offset clauses in auto policies. See *Wood v. Mutual of Enumclaw*, 97 Wash. App. 721, 723, 986 P.2d 833 (1999), And it does not undermine PIP fault free payments to allow contractual subrogation reimbursement when third parties are fully or even partially at fault. The insured has received the benefit either way.

V. CONCLUSION

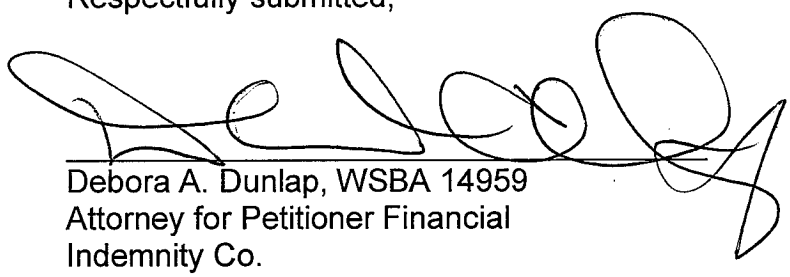
The Petitioner Financial Indemnity Company therefore requests the Supreme Court overrule the Court of Appeals

[1] Hamm v. State Farm, Safeco v. Woodley, Tolson v. Allstate, Peterson v. Safeco, Winters v. State Farm, Wood v. Mutual of Enumclaw, Mahler v. Szucs.

decision and reinstate the trial court determination that Financial Indemnity Company is entitled to full offset of the PIP benefits it paid per optional PIP coverage from an arbitration award under optional UIM coverage because the insured's adult child Kevin Sherry was fully compensated for his losses he was not responsible for.

DATED this 19th day of March, 2007.

Respectfully submitted,



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APPENDIX

RCW 4.22.015
"Fault" defined.

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

[1981 c 27 § 9.]

RCW 48.22.090
Personal injury protection coverage — Exceptions.

An insurer is not required to provide personal injury protection coverage to or on behalf of:

(1) A person who intentionally causes injury to himself or herself;

(2) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;

(3) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;

(4) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;

(5) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made;

(6) A relative while occupying a motor vehicle owned by the relative or furnished for the relative's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made; or

(7) An insured whose bodily injury results or arises from the insured's use of an automobile in the commission of a felony.

[2003 c 115 § 3; 1993 c 242 § 3.]

Notes:
Severability -- Effective date -- 1993 c 242: See notes following RCW 48.22.005.